In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 951

ROBERT M. MUSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court wrote no opinion. The opinion of the court of appeals (Pet. App. A1–A3) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1968. (Pet. App. A16.) The petition for a writ of certiorari was filed on January 16, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether evidence used at petitioner's trial for tax evasion was obtained from him in violation of his con-

333-450—69

stitutional rights because the investigating special agent of the Internal Revenue Service failed to describe his inquiries as a criminal investigation and to advise petitioner that he had a right to have an attorney present.

STATEMENT

After waiving a jury trial, petitioner was convicted in the United States District Court for the Eastern District of Missouri on all counts of a three-count indictment charging that he had wilfully sought to evade income taxes by filing false and fraudulent individual income tax returns for the years 1960, 1961 and 1962. He was sentenced to one year and $1,500 fine; the term of imprisonment was then suspended for a two year probationary period.

The only question here concerns the district court's denial, affirmed by the United States Court of Appeals for the Eighth Circuit on appeal, of petitioner's pretrial motion to suppress evidence given by him to Internal Revenue agents during the course of interviews (Tr. 28). Petitioner himself did not testify at the proceedings on the motion to suppress; the only witnesses called were Internal Revenue Agent Brody and Special Agent McGuire of the Intelligence Division, Internal Revenue Service (Tr. 2, 12).

Agent Brody testified (Tr. 2–11) that he requisitioned petitioner's returns in late 1963 or early 1964, on the basis of information obtained in his investi- tion of petitioner's brother's tax returns. Thereafter, he interviewed petitioner twice, telling him that his purpose was to determine petitioner's correct tax liability. Shortly after the second interview, Brody

referred the case from the Audit Division to the Intelligence Division for consideration of the possibility that fraud had occurred. It was then that he first specifically discussed petitioner with Special Agent McGuire, although the two had previously cooperated in investigating petitioner's brother and, during that investigation, questions had arisen as to whether certain income was petitioner's or the brother's (Tr. 5–6, 24).

Special Agent McGuire testified (Tr. 12–26) that he began investigating petitioner's returns after Agent Brody referred the case to the Intelligence Division. On March 2, 1964, he had his first meeting with petitioner (Tr. 16–17); he identified himself as a special agent and warned petitioner (Tr. 26):

> Under the Constitution of the United States you have the right to refuse to answer questions or make any statement which may tend to incriminate you under the laws of the United States. Anything you say, any evidence you produce may be used against you in any proceeding which may hereafter be undertaken by the United States.

Petitioner replied that he understood (Tr. 26). McGuire did not tell petitioner that it was a "criminal investigation" because at that point he did not know the extent of any understatements, did not know that criminal prosecution would be recommended, and regarded the case as "still in what I call a preliminary stage" (Tr. 17–19). He asked petitioner to prepare some expense analyses to enable him to determine whether or not petitioner had understated his

income (Tr. 16). In the several further meetings which occurred over the next eighteen months, petitioner produced the requested documents; no further warnings were given (Tr. 18–20).

At a meeting on October 14, 1965, McGuire asked petitioner if he would sign a statement. Petitioner asked "what direction the investigation was going" and whether he needed a lawyer. McGuire replied that it appeared that criminal prosecution would be recommended and that it was for petitioner to decide whether he needed a lawyer (Tr. 20–22). Petitioner signed no statement at this meeting, but returned two weeks later to do so; in the statement he signed he said that he knew his tax returns were incorrect when he filed them and that his purpose in filing them was to prevent a tax investigation of his brother (Tr. 22–25; Govt. Ex. 4). It was stipulated that McGuire would have testified that the statement embodied "oral admissions [petitioner made] during the course of several meetings" (Govt. Ex. 5; Tr. 31).

ARGUMENT

In substance, petitioner contends that his disclosures to the revenue agents were not made freely or voluntarily (1) because he was not told in so many words that the tax investigation was a criminal investigation (Pet. 8–10), and (2) because he had not been given the warnings prescribed for custodial interrogation in *Miranda* v. *Arizona*, 384 U.S. 436. The court of appeals correctly rejected both contentions.

1. Petitioner has failed to lay any record basis for his claim that he was deceived about the possibility of

criminal prosecution, inherent in this or any tax investigation, by Special Agent McGuire's failure explicitly to state that the investigation was criminal in nature.[1] At their first meeting, Agent McGuire warned petitioner that he had the right "to refuse to answer questions or make any statement which may tend to incriminate you" and that "any evidence you produce may be used against you in any proceeding which may hereafter be undertaken by the United States" (Tr. 26). After such a warning, no one could believe that there was no possibility of subsequent prosecution in which evidence or statements thereafter given might be used. Petitioner stated that he understood the warning (*ibid.*), and no reason appears for doubting that he did. Indeed, his awareness of his brother's questionable tax practices gives every reason to believe he did understand. The situation would have been no clearer had Agent McGuire added that his investigation was "criminal."

Moreover, petitioner's notion that all investigations conducted by special agents are "criminal" (Pet. 8–10; see also *United States* v. *Turzynski*, 268 F. Supp. 847 (N.D. Ill.)) is imprecise. Although in general special agents are assigned to a case once criminal prosecution appears to be a possibility, that appearance is often remote. The agent must determine, first, whether any tax is due, and if so, whether civil or criminal penalties or both or neither should be

[1] We do not interpret petitioner's argument (Pet. 8–10) as contending that Agent Brody (not a special agent) was remiss in failing to give appropriate warnings. In fact, the record does not show that any incriminating evidence was given to any agent prior to Special Agent McGuire's first meeting with petitioner.

recommended. See *DeMasters* v. *Arend,* 313 F.2d 79 (C.A. 9); *Kohatsu* v. *United States,* 351 F.2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011. Thus, Agent McGuire could not have informed petitioner in the spring of 1964, as he did in the fall of 1965, that it appeared a criminal prosecution would be recommended; the court of appeals correctly concluded (Pet. A3) that "the statements were not obtained by misrepresentation [or] fraud."

2. Nor is there merit in the argument (Pet. 10–14) that admissions made by petitioner to the agents should have been excluded because he was not warned of his right to counsel under *Miranda* v. *Arizona,* 384 U.S. 436. *Miranda* requires that warnings be given a person who "has been taken into custody or otherwise deprived of his freedom of action in any significant way. * * *" (384 U.S. at 444). Although the admissions here were made in the office of the Internal Revenue Service, petitioner was neither in custody nor deprived of his freedom of action in any way when he provided the evidence in question. The courts of appeals have uniformly rejected contentions that the *Miranda* warning is required in such circumstances, and there is no reason for a different result here.[2] See, *e.g., Schlinsky* v. *United States,* 379 F. 2d 735 (C.A. 1), certiorari denied, 389 U.S. 920; *Spinney* v. *United States,* 385 F. 2d 908 (C.A. 1), certiorari denied, 390 U.S. 921; *United States* v. *Mackiewicz,*

[2] *United States* v. *Turzynski,* 268 F. Supp. 847 (N.D. Ill.) and other district court cases which petitioner claims to be in conflict with these decisions (Pet. 11) have attracted no following in the courts of appeals.

401 F. 2d 219 (C.A. 2), certiorari denied, 393 U.S. 923; *United States* v. *Mancuso,* 378 F. 2d 612 (C.A. 4), certiorari denied, 390 U.S. 955; *Thomas* v. *United States,* 370 F. 2d 96 (C.A. 5), certiorari denied, 386 U.S. 975;[3] *United States* v. *Maius,* 378 F. 2d 716 (C.A. 6), certiorari denied, 389 U.S. 905; *United States* v. *Mansfield,* 381 F. 2d 961 (C.A. 7), certiorari denied, 389 U.S. 1015; *Frohmann* v. *United States,* 380 F. 2d 832 (C.A. 8), certiorari denied, 389 U.S. 976; *Kohatsu* v. *United States,* 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011.[4]

Here, petitioner was warned that he need not answer the agent's questions, and that whatever he said might be used against him in a criminal prosecution. Although he refers to "the pressures imposed upon a person when he is confronted with a visit from Government agents" (Pet. 13), he acknowledges in

---

[3] Although this issue is not discussed in the Fifth Circuit's *per curiam* opinion, it is evident from Mr. Justice Douglas' dissent from the denial of certiorari in *Thomas* that the question was raised in the case. Cf. *Evans* v. *United States,* 377 F. 2d 535 (C.A. 5).

[4] The other cases petitioner cites are without relevance here. In *Massiah* v. *United States,* 377 U.S. 201, a defendant under indictment was deceived into talking freely with a person acting as a government agent, thus effectively depriving him of the protection of counsel. *Windsor* v. *United States* 389 F. 2d 530 (C.A. 5), involved facts that amount to custody: Federal Bureau of Investigation agents cornered a known car thief in his hotel room and confronted him with the confession of his accomplice. In *United States* v. *Fruchtman,* 282 F. Supp. 534 (N.D. Ohio), the witness divulged self-incriminating information under the compulsion of a grand jury subpoena. And in *Mathis* v. *United States,* 391 U.S. 1, as in *Miranda,* the petitioner was in custody when he made his disclosures.

this regard neither this warning, nor the lack of any compulsion on him to meet with McGuire. In sum, the compelling immediacy of custodial interrogation was lacking here; as the court of appeals observed (Pet. A3), petitioner was neither deceived nor in any way the victim of coercion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JOHNNIE M. WALTERS,
Assistant Attorney General.
JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys.

FEBRUARY 1969.

U.S. GOVERNMENT PRINTING OFFICE: 198